

1 TOMAS A. ORTIZ (SBN 188873)  
tortiz@zuberlawler.com  
2 JEFFREY J. ZUBER (SBN 220830)  
jzuber@zuberlawler.com  
3 **ZUBER LAWLER LLP**  
350 S. Grand Avenue, 32nd Floor  
4 Los Angeles, California 90071  
Telephone: (213) 596-5620  
5 Facsimile: (213) 596-5621

6 Attorneys for Federal Deposit Insurance  
Corporation as Receiver for First Republic Bank  
7

8 **UNITED STATES DISTRICT COURT**

9 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**  
10

11 GEORGE A. MILLER and JANET  
McKINLEY,

12 Plaintiffs,

13 v.  
14

15 FIRST REPUBLIC BANK, SAMUEL CARL  
SCHONER, and DOES 1-10,

16 Defendants.  
17  
18  
19  
20  
21

Case No. 3:23-cv-03975-JD

**FEDERAL DEPOSIT INSURANCE  
CORPORATION AS RECEIVER FOR  
FIRST REPUBLIC BANK'S NOTICE OF  
MOTION AND MOTION TO DISMISS  
FOR LACK OF SUBJECT MATTER  
JURISDICTION PURSUANT TO  
FEDERAL RULE OF CIVIL  
PROCEDURE 12(b)(1)**

[Filed concurrently with Declaration of  
Jeffrey J. Zuber, Request for Judicial Notice,  
and [Proposed] Order]

Judge: Hon. James Donato  
Date: September 28, 2023  
Time: 10:00 a.m.  
Crtrm: 11

22 **TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:**

23 **PLEASE TAKE NOTICE THAT** on September 28, 2023, at 10:00 a.m. or as soon  
24 thereafter as counsel may be heard, in the courtroom of the Honorable James Donato, located in  
25 the United States Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102, Federal  
26 Deposit Insurance Corporation as Receiver for First Republic Bank ("FDIC-R") will and hereby  
27 does move this Court pursuant to Federal Rule of Civil Procedure 12(b)(1) to dismiss all claims  
28 asserted against FDIC-R in these proceedings by plaintiffs George A. Miller and Janet McKinley

1 (“Plaintiffs”).

2 This Motion is made on the ground that pursuant to 12 U.S.C. § 1821(d)(13)(D), the Court  
3 lacks jurisdiction over Plaintiffs’ claims because Plaintiffs have failed to exhaust administrative  
4 remedies in accordance with 12 U.S.C. § 1821(d)(5). Therefore, the Court should dismiss  
5 Plaintiffs’ claims for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

6 This Motion is based on this Notice of Motion, the attached Memorandum of Points and  
7 Authorities, the Declaration of Jeffrey J. Zuber, Request for Judicial Notice and Exhibits filed  
8 concurrently herewith, all of the pleadings, files, and records in this proceeding, all other matters  
9 of which the Court may take judicial notice, and any argument or evidence that may be presented  
10 to or considered by the Court prior to its ruling.

11  
12 Dated: August 17, 2023

Respectfully submitted,

13 **ZUBER LAWLER LLP**

14 JEFFREY J. ZUBER

15 TOMAS A. ORTIZ

16 By: /s/ Jeffrey J. Zuber  
17 Attorneys for Federal Deposit Insurance  
18 Corporation as Receiver for First Republic Bank  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. FACTUAL AND PROCEDURAL BACKGROUND.**

On July 17, 2023, Plaintiffs George A. Miller and Janet McKinley filed this action against First Republic Bank with the Superior Court of the State of California for the County of San Francisco, *George A. Miller, et al. v. First Republic Bank, et al.*, Case No. CGC-23-607628 (the “California State Action”). (Exhibit C; Declaration of Jeffrey J. Zuber (“Zuber Decl.”), para. 3.)

On May 1, 2023, prior to the filing of the California State Action, First Republic Bank was closed by the California Department of Financial Protection and Innovation, and the FDIC accepted appointment as First Republic Bank’s receiver (“FDIC-R”). (Zuber Decl., para. 4-5; Exs. D and E.) By operation of federal law, in its role as Receiver, the FDIC-R has succeeded to all rights, titles, powers, and privileges of First Republic Bank, including the California State Action. *See* 12 U.S.C. §§ 1821(d)(2)(A) and 1821(d)(2)(B).

On August 4, 2023, the FDIC-R substituted into the place of First Republic Bank as a real party in interest in the California State Action and subsequently removed the entire case to the United States District Court for the Northern District of California on August 7, 2023. (Zuber Decl., paras. 6-7, Exs. F and G, respectively.)

Each plaintiff has been served a notice to present their proof of claim by the FDIC-R, and been advised through counsel that they must exhaust administrative remedies before proceeding with a lawsuit in any court against FDIC-R. (Zuber Decl., para. 2; Exs. A and B.) As of the date of this motion, plaintiffs have not dismissed the action nor agreed to pursue their administrative remedies as required by statute.

Accordingly, FDIC-R respectfully requests this Court dismiss Plaintiffs’ claims for lack of subject matter jurisdiction.

**II. EXHAUSTION OF ADMINISTRATIVE REMEDIES IS A PREREQUISITE TO JURISDICTION.**

Federal courts are courts of limited jurisdiction and limits on federal jurisdiction cannot be disregarded or evaded. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). A plaintiff must therefore allege a proper basis for subject matter jurisdiction. *See* Fed. R. of Civ. P.

8(a)(1); *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). A motion to dismiss for lack of subject matter jurisdiction is authorized by Fed. R. Civ. P. 12(b)(1).

When jurisdiction is contested, a plaintiff who has invoked a court's jurisdiction bears the burden of establishing propriety of jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). The court presumes a lack of subject matter jurisdiction until the plaintiff proves otherwise. *Stock W., Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Unless plaintiff establishes that the court has subject jurisdiction, upon motion, the court must dismiss the plaintiff's complaint. *Id.*

In considering a motion to dismiss for lack of subject matter jurisdiction, "the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa County*, 343 F.3d 1036, 1052 (9th Cir. 2003).

If the opposing party fails to meet this burden, the action must be dismissed for lack of subject matter jurisdiction. *See Kokkonen*, 511 U.S. at 377; *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

**A. The FIRREA Administrative Claims Process is Mandatory, Not Voluntary.**

The Federal Deposit Insurance Act, as amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), establishes an administrative claims process which all persons asserting claims must exhaust before they may commence litigation on a claim. 12 U.S.C. § 1821(d)(3)-(13) ("Administrative Claims Process"); *Benson v. JPMorgan Chase Bank, N.A.*, 673 F.3d 1207 (9th Cir. 2012); *McCarthy v. FDIC*, 348 F.3d 1075, 1081 (9th Cir. 2003). The claims to which this requirement applies include:

- (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC]

1 has been appointed receiver, including assets which the [FDIC] may acquire from  
 2 itself as such receiver; or (ii) any claim relating to any act or omission of such  
 3 institution or the [FDIC] as receiver.

4 12 U.S.C. § 1821(d)(13)(D).

5 Pursuant to the Administrative Claims Process, shortly after a financial institution is  
 6 placed in receivership, the FDIC publishes a notice setting a bar date for filing claims against the  
 7 receivership, which may be not less than 90 days after the publication of such notice. 12 U.S.C.  
 8 §1821(d)(3)(B). Claims filed after the published bar date must be “disallowed and such  
 9 disallowance shall be final,” unless the late-filed claims exception set forth in 12 U.S.C.  
 10 §1821(d)(5)(C)(ii) applies. 12 U.S.C. § 1821(d)(5)(C)(i).

11 Once the claimant files a claim, the FDIC, as receiver, has 180 days within which to  
 12 review and allow or disallow a claim and to notify the claimant of the allowance or disallowance  
 13 of the claim. 12 U.S.C. § 1821(d)(5)(A). A claimant has 60 days after the FDIC provides notice of  
 14 the disallowance of a claim or the end of the 180-day claims review period (if the FDIC, as  
 15 receiver, does not provide notice of the allowance or disallowance of the claim within the 180-day  
 16 claims review period) to “file suit on such claim (or continue an action commenced before the  
 17 appointment of the receiver) in the district or territorial court of the United States for the district  
 18 within which the depository institution’s principal place of business is located or the United States  
 19 District Court for the District of Columbia (and such court shall have jurisdiction to hear such  
 20 claim).” 12 U.S.C. § 1821(d)(6).

21 **B. No Court has Jurisdiction until Administrative Claims Process is Exhausted.**

22 Until a plaintiff exhausts the Administrative Claims Process, no court has subject matter  
 23 jurisdiction over the plaintiff’s claims. 12 U.S.C. § 1821(d)(13)(D); *Henderson v. Bank of New*  
 24 *England*, 986 F.2d 319 (9th Cir. 1993); *Intercont’l Travel Mktg., Inc. v. FDIC*, 45 F.3d 1278,  
 25 1283 (9th Cir. 1994); *McCarthy, supra* at 1081. “[A]n administrative exhaustion rule is  
 26 meaningless if claimants may impede and abandon the administrative process and yet still be  
 27 heard in the federal courts.” *Vinieratos v. United States*, 939 F.2d 762, 772 (9th Cir. 1991).  
 28 Furthermore, this jurisdictional bar “extends to all claims and actions against, and actions seeking

1 a determination of rights with respect to, the assets of failed financial institutions for which the  
 2 FDIC serves as receiver” and to all claims arising both prior to and after the appointment of the  
 3 FDIC as receiver. *Id.*

4 Finally, the lack of subject matter jurisdiction resulting from a claimant’s failure to exhaust  
 5 the Administrative Claims Process cannot be waived and may be raised at any time.  
 6 *Intercontinental Travel Mktg. Inc.*, supra at 1286; *see also* Fed. R. Civ. P. 12(h)(3). The FDIC-R  
 7 raises this issue here, in its first responsive pleading.

8 **III. PLAINTIFFS’ CLAIMS AGAINST FDIC-R MUST BE DISMISSED FOR LACK**  
 9 **OF JURISDICTION.**

10 Congress enacted FIRREA to enable the federal government to respond swiftly and  
 11 effectively to failed or failing banks and savings institutions. *Henderson*, 986 F.2d at 320. It  
 12 streamlined the process of resolving failed banks by including provisions in FIRREA which  
 13 require administrative review of all claims asserted against a FDIC Receiver. *See* 12 U.S.C. §  
 14 1821(d)(3)-(10). The receivership claims process was conceived to permit the FDIC “to quickly  
 15 resolve many of the claims against failed financial institutions without unduly burdening the  
 16 District Courts.” *Henderson*, 986 F.2d at 320. “In enacting FIRREA, Congress anticipated that  
 17 [FDIC] would face numerous claims... Accordingly, it sought to reduce the volume of formal  
 18 litigation...by providing for administrative review of such claims...before judicial proceedings  
 19 could commence.” *Stamm v. Paul*, 121 F.3d 635, 639 (11th Cir. 1997). The statute contains no  
 20 provision granting federal jurisdiction to claims filed after a receiver is appointed but before  
 21 administrative exhaustion. *Meliezer v. RTC*, 952 F.2d 879 (5th Cir. 1992).

22 More to the point, Section 1821(d)(13)(D) strips all courts of jurisdiction over claims made  
 23 outside the administrative procedures of section 1821:

24 (D) Limitation on judicial review

25 Except as otherwise provided in this subsection, no court shall have jurisdiction over—

26 (i) any claim or action for payment from, or any action seeking a determination of rights  
 27 with respect to, the assets of any depository institution for which the Corporation has been  
 28 appointed receiver, including assets which the Corporation may acquire from itself as such

1 receiver; or

2 (ii) any claim relating to any act or omission of such institution or the Corporation as  
3 receiver.

4 12 U.S.C. § 1821(d)(13)(D).

5 A claimant must therefore first complete the claims process before seeking judicial  
6 review. *See, Henderson v. Bank of New England*, 986 F.2d at 320; *Abbott Bldg. Corp. v. United*  
7 *States*, 951 F.2d 191, 194 n. 3 (9th Cir.1991) (“FIRREA did create a claims procedure, and  
8 required its exhaustion.”); *Local 2 v. FDIC*, 962 F.2d 63, 66 (D.C.Cir.1992); *Marquis v. FDIC*,  
9 965 F.2d 1148, 1151 (1st Cir.1992); *Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 391 (3d Cir.),  
10 cert. denied, 502 U.S. 981, 112 S.Ct. 582, 116 L.Ed.2d 608 (1991). The statute specifically bars  
11 judicial review of any non-exhausted claim, monetary or nonmonetary, which is “*susceptible of*  
12 *resolution through the claims procedure.*” *Rosa*, 938 F.2d at 934 (*emphasis added*); 12 U.S.C. §  
13 1821(j) (“Except as otherwise provided in this section, no court may take any action ... to restrain  
14 or affect the powers or functions of the Corporation as a conservator or a receiver”).

15 “The phrase ‘except as otherwise provided in this subsection’ refers to a provision [12  
16 U.S.C. § 1821(d)(6)(A)] that allows jurisdiction after the administrative claims process has been  
17 completed.” *McCarthy v. FDIC*, 348 F.3d 1075, 1078 (9th Cir. 2003). “A claimant must complete  
18 the claims process before seeking judicial review... [FIRREA] bars judicial review of any non-  
19 exhausted claim...which is susceptible of resolution through the claims procedure.” *Henderson*,  
20 986 F.2d at 320-21; *see also In re Parker N. Amer. Corp.*, 24 F.3d 1145, 1150 (9th Cir. 1994).  
21 (noting that “[FIRREA] strips all courts of jurisdiction over claims outside the administrative  
22 procedures [and] claimants must exhaust...administrative remedies before seeking [judicial]  
23 review”).

24 Plaintiffs assert four claims for breach of fiduciary duty, negligence, elder abuse and fraud,  
25 respectively in their complaint. (Zuber Decl., para. 3, Ex. C.) Each of the four claims are subject to  
26 resolution by way of FIRREA’s administrative procedures. Although the complaint was filed  
27 after FDIC-R was appointed, Plaintiffs have not filed a claim for administrative review under  
28 FIRREA. Even had the Plaintiffs filed a claim, the claims process must be exhausted before the

1 Plaintiffs could bring this claim. Accordingly, as a matter of law, this Court lacks subject matter  
2 jurisdiction over Plaintiffs' action, and it must be dismissed. *See Gwaltney of Smithfield, Ltd. v.*  
3 *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 69, 108 S.Ct. 376, 387, 98 L.Ed.2d 306 (1987).

4  
5 **IV. CONCLUSION**

6 On the basis of the foregoing, the FDIC-R respectfully requests that this Court grant this  
7 motion and dismiss this action for lack of subject matter jurisdiction.

8  
9 Dated: August 17, 2023

Respectfully submitted,

10 **ZUBER LAWLER LLP**

11 JEFFREY J. ZUBER

12 TOMAS A. ORTIZ

13 By: /s/ Jeffrey J. Zuber

14 Attorneys for Federal Deposit Insurance  
15 Corporation as Receiver for First Republic Bank  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28